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ABSTRACT

This paper discusses issues concerning legal protection and the legal rights of children, child law in the United States and in Europe, and attitudes of lawyers and child specialists regarding proposed changes in child protection and child rights laws. Several issues were identified. (1) How can children receive additional legal protection without detracting from the legal advantages that parents, teachers, and other adults enjoy because of their larger power base? (2) How can the unwanted side-effect of diminishing children's legal rights through the passing of child-protection laws be avoided? (3) At what age and under what circumstances should children be given adult legal status? (4) Do the rights in the Constitution apply to children as well as to adults? A large section of the paper is devoted to the problem of the inter-state coordination of child laws. This is handled in the U.S. through such mechanisms as the Constitutional provision of "full faith and credit" which instructs the various states to observe the laws of sister states. European mechanisms of inter-country coordination include international organizations such as the United Nations and the Council of Europe. In addition to this discussion, tentative findings are reported on the attitudes of groups of family and child workers in comparison to lawyers concerning their support of Scandinavian-type child-rights laws. In general, more of the child specialists than the lawyers were in favor of these laws. (Author/SS)

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Children's Legal Status After the International Year of the Child

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Introduction

The question raised by this OMEP conference--"The Young Child, A Full-Fledged Citizen?"--is laughingly easy to answer if we are discussing legal citizenship: In terms of the current American slang, Is the child a full-fledged citizen? No way! This presentation will examine some of the difficult aspects related to children's legal position and will speculate about the role child specialists might play in relationship to developing law as an aid to childhood.

It seems especially appropriate to assess the status of child law while the memory of our recent pro-child declarations in conjunction with the International Year of the Child is still fresh.

Of course, we do not naively expect a year's observance to impact heavily on the welfare of children. We tend, instead, to be skeptical about days or weeks or years which are designed to memorialize special social goals. We recall that in the USA we shot a leading black civil rights leader during Brotherhood week, and in Iran marching women were stoned on International Women's Day.

Still, we are not entirely skeptical; we expect some progress

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In much of the Western World a persistent legal concern is how to provide children with the additional legal protections that their additional vulnerabilities require. A restatement of this concern might be, how can children receive additional legal protection without detracting from the legal advantages that parents, teachers, and other adults enjoy because of their larger power base? That is, one does not have to be entirely cynical to recognize that the widespread urge to improve the lot of children--legally--will be more apt to be operationalized--to be put into law--if it can be done without much expense to adults. Although laws are instigated out of a variety of motivations, including the protection of the weak, there is a notable tendency over the ages for laws to protect power rather than powerlessness.

A further complication in the operationalization of the commendable desire of nations to protect their children via law is that the child-protection laws often have the side-effect of actually diminishing children's legal rights. Children, for example, are subject to punishment under the so-called "status offenses" which are not offensive at all if committed by an adult: A child can be punished for running away from home, but there is no really similar law for adults. Or, another example, the law establishes a juvenile court to protect children from the rigors of the adult court system; but the juvenile court may--usually does--abolish such rights as the right to public hearing, trial by jury, and representation by counsel.

Even "the very idea of children having rights (says Michael Wald in a recent article) is, in many ways, a revolutionary one. Historically, children have been under the control of their parents, and to a lesser degree, the state....In lieu of most rights, the state affords children special protection."

Historically, some law that is now regarded as child-protection or child-right law was not actually designed to be so. Some early adoption laws, for

example, were designed to serve, not a child, but a man who had no heir--no one to receive his name and his estate. Adopters had to be over age 50 and the adoptees over age 21 and in perfect health. Clearly, these laws were not designed to protect powerless little children.

As for the potential conflict between the rights of the child and the rights of adults, it does seem possible that much of that conflict can be kept on the potential rather than the actual level. Professor Bettye Caldwell has written and spoken on the problem of "balancing children's rights and parents' rights" and on "avoiding the confrontation" between these two systems of legal perogatives. And when the confrontation cannot be avoided, she suggests principles of arbitration and of service delivery which would protect "both sides". But she has also noted that in attempts to provide legal supports for the family, our society often omits the special consideration of the children..... "family" being loosely synonymous with "parents" or "adults".

That is a warning for us to keep in mind as we examine our legal structure to see what it is doing for and to children. And that is a warning that is especially poignant if we are as Glendon, Aries and Keniston and others seem to believe, historically once again in an age that is becoming indifferent to children--an age where adults resent children's interference in adult pleasure, where adults may increasingly turn to such anti-child activities as child abuse and child pornography.

Child Law in the U.S.A.

In the USA, the topic of children and the law is certainly a tale of contradictions. The states differ as to what a child should be allowed or required to do at various ages; and until recently our 18-year-olds could be drafted and die for their country but could not vote, or even marry without parental consent.

We, in the USA, seem to be moving, generally speaking, to provide adult-like legal structures for the older adolescents--that is, we are lowering the age of majority in specific instances such as voting, buying liquor, etc.; but in some states we are going the opposite direction and raising the age. And even within a specific state there may be some confusion of law: 18 is considered the age of majority in one state, but you can get a driver's license at 16, and you can't buy alcohol until 21. When, then, does the child become an adult (legally speaking)?

The American dilemma seems to have roots in our uncertainty as to just what children are, legally. The current children's rights movement may have begun with a 1943 Supreme Court decision that said that the rights found in the Constitution apply to children as well as to adults. But do they? They didn't, and just over 10 years ago the Court once again had to remind us that children are "persons" under our Constitution, and as such are protected by the Bill of Rights. But are they persons? Some people like the term "developing persons" better; and Bennett and McDonald, in The Family Coordinator's special issue on The Family and the Law (Oct. 1977) propose a five-point guideline system for building a Constitutional Amendment which would allow us to view children as developing persons.

Since this tendency to view children as "developing persons" may be "catching-on", it is important that child specialists view it critically: does it open up the door for even more anti-child law? Or does it offer a legal formula for protecting children and their rights?

Child Law in Europe

My own recent research has been in Western Europe. There--since it offers such a clear parallel with the Canadian and USA situations, I was especially interested in how the various countries, with their quite different cultures and legal structures, can manage to create child laws which will not catch

children in the kinds of interjurisdictional problems that create "limping marriages and divorces" for their parents. (Couples who do not know when they move from country to country if they are legally married or divorced.) In Europe, the process of coordinating different laws so as not to harm people because of the differences is known as the harmonization of law.

In the United States the harmonization of the family laws of the 50 states is attempted through the utilization of such mechanisms as the Constitutional provision of "full faith and credit" which instructs the various states to observe the laws of sister states, and through the model marriage and divorce laws of the National Conference of Commissioners on Uniform State Laws. Federal laws and federal courts, and a Constitutional recognition of which jurisdictions will have priority when laws differ, also help achieve harmonization of the family laws of the United States. Western Europe uses other mechanisms.

One such mechanism is provided by several international organizations which have put forth declarations and agreements to which the various nations are invited to subscribe. The United Nations' efforts, of course, go beyond the borders of Western Europe. Although the members of the United Nations have diverse views on family life, the attempt has been made to find a level upon which all can agree. The Universal Declaration of Human Rights attempts to set some very broad guidelines for humans in general, and the UN's Declaration of the Rights of the Child sets a strong moral foundation both for nondiscrimination against children and for special protections of children.

Another multinational organization--the Council of Europe--has made reform of family law one of its goals in recent years. In fact, the Council of Europe would seem to be the major international body working for the harmonization of family law in Western Europe.

The Council of Europe is a permanent political body of 21 member states. Established in 1949 it has a headquarters in Strasbourg, France. Although the recommendations of the Council of Europe cover a wide range of topics, the child and family law suggestions tend to focus on the equalization of the benefits of law for women as compared with men and for children as compared with adults. Council documents speak of achieving a more "symmetrical" relationship within the family -- one where rights and duties are more equally shared. One of the Council's background papers notes: "The family is not merely one of several fields in which equality should be the goal. Equality within the family is the starting point and precondition for equality in other fields".

Regarding children, the Council has suggested safeguards for children of adoption. The Council has insisted on the free consent of the child's parents to give the child up to adoption. Adoption, the Council holds, may be by a married couple or by a single person. And, most important, the adopted child is to be viewed legally exactly the same as a child born into the family. The Council is proposing the establishment of an international tribunal to settle child custody cases, with the welfare of the child being the central concern of the agency. Other moves by the Council deal with the nationality of children born to parents of differing nationalities, the inheritance of property by children, and the age of "full legal capacity". The Council also holds that children born out of wedlock are to be, legally, the same as children born in wedlock. Most of these principles concerning children and the law are found in recommendations and conventions of the Council such as "The European Convention on the Adoption of Children".

The Child Specialist and Child Law

Finally, I want to open the exploration of what stance we as child specialists should take regarding child law.

To begin, we should recognize that we do not respond to this challenge just as child specialists. We are, first, human beings. And like other humans, we probably have some prejudices about the use of law for any social goal. Some of us are friendly to the idea of law supporting our own efforts to help children, but some of us are probably skeptical of the law--we would rather it left us alone.

Some of us probably agree with Edward Coke, who said that "law...is the perfection of reason", and with Samuel Johnson who called law "the last result of human wisdom."

But others of us might side with Charles Macklin's view that "law... is a sort of hocus-pocus science". And it was a character of Charles Dickens who claimed, "The law is an ass, an idiot."

Some of us believe that laws should set minimal standards; others hold that law should point to the ideal. In the USA at one time we had a movement to pass racial laws that would put the nation on record as being opposed to discrimination even though the laws were regarded as largely unenforceable. In Sweden, recently, a law forbidding parents from spanking their children was passed even though the people who passed it knew that it could not be enforced.

Some of us believe in laws to protect children. Others believe in laws to provide children with rights. And still others talk of laws to provide child-power. Opinion on the topic of child law certainly ranges from Richard Farson's plea for the elimination of state and parental control over children to some who regard children, as traditionally they were regarded, as wards of parents and/or state.

In general, Judge Sandra Johnson holds, in her article in the American Bar Association's FAMILY ADVOCATE (fall, 1979), the law does not lead social reform as far as families and children are concerned, but is, instead, playing a frantic game of catch-up with rapidly changing social realities.

I suspect that the lag between social reality regarding families and children on one hand the law on the other hand may continue for some time. It symbolizes a basic conservatism in the law. Perhaps it also symbolizes a more conservative stance on the part of the law makers than social actionists wish to see. To explore this posibility, I have been making a study of different occupational groups to see what opinions they have about certain child-oriented laws. Basically, I want to know which occupational groups (nurses, police, lawyers, family agency workers, child specialists, clergy, etc.) in my part of the world would favor the Scandanavian-type child-rights laws. To date, the most important thing that I have seen in my data is that the lawyers that I have tested are really quite different from the groups of child and family workers.

It seems important to me to discover these potential differences of philosophy regarding child law. What child specialists think is important, even though they don't directly make law. What lawyers think is important; for one thing, about 20% of the members of state legislatures in the USA are lawyers, with no other occupational group coming close to that proportion.

Before looking at some of the early trends in the data I have been collecting, I must insist that these be regarded as only very tentative "findings". The study is very much in process and I would probably be wiser if I did not share the results so prematurely. However, I especially wanted you to see some important differences that will <u>probably</u> hold up as the study continues.

Let's take that Swedish law that prohibits parents from spanking their children, for example. Without using Sweden as the example, I have just asked

various occupational groups, if it should be illegal for a parent to spank a child. (These are Indiana occupational groups.)

None of my 61 attorneys thought it would be a good idea to pass such a law, but 7% of the 108 members of the Indiana Association for the Education of Young Children thought so.

The Swedish law also prohibits parents from shaming or ridiculing a child, and so I asked if my Indiana professionals wanted a law like that. While spanking seemed O.K. with them, ridiculing was less so. Twelve percent of the attorneys would like a law prohibiting the ridiculing of children, and 41% of child specialists (IAEYC) would.

I tried to see if the concepts of the child protection and child rights could be distinguished. I asked:

> "In general, the law should be revised so as to give children more protection."

Yes, said 41% of the lawyers and 77% of the child specialists.

> "In general, the law should be revised so as to give children greater rights."

The yes votes dropped to 26% for lawyers and 64% for child workers. Another general principle: "In cases where the rights of a child conflict with family rights or the rights of a parent or parents, the law should support the rights of the child." Ten percent of the lawyers agreed and so did 26% of the child workers.

Then I asked the group of attorneys and the group of child specialists if they would favor other kinds of child laws. Again, the laws I chose are being used or at least being considered in Sweden, but I did not say so--and some respondants told me that the ideas were too preposterous to take seriously:

"A child should have an attorney when his/her parents are being divorced."

Eighteen percent of the attorneys and 41% of the child workers agreed.

"A child should be permitted to divorce his/her parents."

Yes, said 5% of the lawyers and 11% of the child workers.

"The State should provide an official ombudsman (an advocate) for children."

Agree: 25% of lawyers and 69% of child workers. Another Swedish law:

"It should be illegal to sell war toys for children."

Yes, said 5% of the attorneys and 49% of the child specialists.

And since the Swedes are officially--legally--committed to wiping out sex role differences in child rearing, I said, "Preschool and primary school education should be designed by law to obliterate sex role differences in child rearing." Twenty percent of the lawyers agreed to that, as did 51% of the child specialists.

But is occupation the only correlate of opinion regarding child law? It seems logical that various sociological characteristics should correlate with our views regarding child law. That is, shouldn't Catholics and Protestants have differing views on what is proper child law? And shouldn't our views of child law differ if we are married or single, have children or not, if we are male or female, have a lot of education or a little? The fact that one is a lawyer or a child specialist explains most of the differences I've found in people's philosophy of child law. Religion has so far been of almost no importance. The male-female differences are small, and being married or not accounts for another small difference.

However, the second most important influence--second to occupation, that is--seems to be how many children we have. People who have 3 or more

children appear to be much less in favor of child-power than do people with no children. But the people with three or more children are also more skeptical about providing additional child rights and child protections. They, for example, are less likely to want to ban war toys or to have a state-appointed child advocate than are married couples with no children.

And on one item of potential interest to this audience age seems more important than does occupation or the fact that one has or does not have children:

Young people believe that public education of the young child should be designed--by law--to obliterate sex role differences in child rearing. Older people are much less apt to believe that.

I do not know what all of these data mean. As with any research, the facts do NOT speak for themselves. We seem not to have (so far) identified categories of people who will want to reform law so as to increase child-power, child-rights, or child-protection to the extent that it is already popular in the Scandanavian countries.

But does that mean we are not pro-child? Hopefully not. But how pro-child are we?

Can the law help us be pro-child?

Is law the aid we seek to give continuity to our efforts to help children--our efforts to make every year the year of the child? (Chaque année une année de l'enfant!)